United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To be argued by:
Mark H. Alcott

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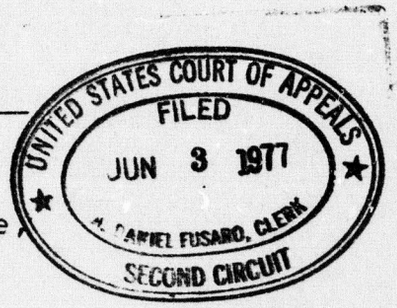
IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



FLLI MORETTI CEREALI S.p.A.,

Plaintiff-Appellee,

-against-

CONTINENTAL GRAIN COMPANY,

Defendant-Appellant.

B P/S

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE DEFENDANT-APPELLANT

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
(212) 644-8000
June 3, 1977

Of Counsel:

Mark H. Alcott
Marvin Wexler

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FLLI MORETTI CEREALI S.p.A., Plaintiff-Appellee,	:	Docket No. 77-7130
v.	:	
CONTINENTAL GRAIN COMPANY, Defendant-Appellant.	:	

BRIEF OF DEFENDANT-APPELLANT

Preliminary Statement

This is an appeal from a summary judgment, entered in the District Court for the Southern District of New York (Ward, J.), awarding appellee $477,896.48 on a contract claim, and dismissing appellant's contract counterclaim and set-off.

This Court has stated, and reiterated, that,

> "[W]hen [a] court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought [citation omitted], with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute."

Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317, 1320 (2d Cir. 1975). See also, United States v. Bosurgi, 530

F.2d 1105, 1110 (2d Cir. 1976); Judge v. City of Buffalo, 524 F.2d 1321, 1323 (2d Cir. 1975).

The court below did not follow this rule. It found that appellant Continental Grain Company ("Continental") could not assert its breach of contract claim, either as a set-off or as a counterclaim, because that claim had been assigned to Continental for the purpose of litigation and, consequently, the assignment was invalid under Section 489 of the Judiciary Law of New York.* In so resolving the delicate factual issue of the assignee's intent and, upon that finding, granting summary judgment against Continental, the court drew every inference, and resolved every ambiguity, against Continental.

The district court did so notwithstanding the established rule that the issue of motive and intent under Section 489 is peculiarly an issue of fact to be determined at trial. Sprung v. Jaffe, 3 N.Y. 2d 539, 544 (1957). Moreover, the court misapplied Section 489, and its holding was erroneous as a matter of law.

The effect of this error was to preclude appellant

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* Section 489 provides in pertinent part that no corporation "shall solicit, buy or take an assignment of . . . [a] thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon. . . ."

from setting off against appellee's $477,896 contract claim a $1,493,500 arbitration award which has been granted on the claim which was assigned to appellant. By requiring appellant to make immediate payment of the $477,896 to a foreign company, before the arbitration award ripens into a final judgment, the district court contravened the concept and purpose of the set-off procedure.

And there was other fundamental error below. This Court has cautioned that summary judgment must be sparingly granted, if "trial by affidavit" is to be avoided. Judge v. City of Buffalo, supra, 524 F.2d at 1322. Yet the court below summarily resolved the factual question of motive, finding the assignment to have been given for the purpose of litigation, even though no affidavit supported that proposition.

Indeed, the issue upon which the motion was decided -- the assignment's validity -- was not the issue which was addressed below by the parties. The issue which was addressed below was whether or not the two contracts here at issue -- a wheat contract asserted by appellee and a soybean contract asserted by appellant as a counterclaim and set-off -- should be treated separately or together. The moving party, appellee F.L.L.I. Moretti Cereali S.p.A. ("Moretti") asserted that there was no relationship between the contracts and, therefore, that

there was no reason to withhold summary judgment on its claim. On the other hand, Continental's witnesses asserted that the two contracts were part of one running account. Consequently, Continental argued below, summary judgment should not be entered on only one part of the account. Clearly, there was a direct conflict of factual assertions on this issue.

The assignment, meanwhile, was treated almost as if irrelevant, and certainly as tangential, to the motion for summary judgment:

-- Moretti did not contend in its Rule 9(g) Statement, which framed the issues on the motion for summary judgment, or in its moving papers, that summary judgment should be granted because the assignment was invalid. To the contrary, Moretti asserted in those papers that a substantial issue existed as to the assignment's validity;

-- As the assignment was not then at issue, Continental's answering papers treated it very briefly, but nevertheless showed that the assignment was made for tax purposes, pursuant to a longstanding relationship between the assignor (Continental's wholly-owned Domestic International Sales Corporation) and Continental;

-- In its reply brief, among other arguments, Moretti

first contended that summary judgment should be granted because the assignment was invalid. However, Moretti presented no affidavit, exhibit or other proof in support of this afterthought argument;

-- The assignment was so far removed from the issues addressed below that it did not become part of the record until it was presented to the court below a few weeks before the court issued its memorandum opinion;

-- From a record which treated the assignment only by peradventure, the court below sua sponte noticed certain facts, resolved material ambiguities and drew material inferences against Continental, decided that no genuine question of fact existed, found that the assignment was made for the purpose of litigation, and consequently held it to be invalid under New York law;

-- Finally, the court below misconstrued and misapplied Section 489 of the Judiciary Law (which, of course, had received little attention in the briefs): The statute is addressed to the evil of champertous transactions and is narrowly applied to defeat only such transactions; but the court below applied the statute to an assignment with not a hint of champerty to it, thereby contravening a well-established line of New York cases. In addition, the district court declared that, under

Section 489, an assignment is invalid if it is not part of a substantial commercial transaction and its primary purpose is to enable the assignee to commence suit. Although the court below cited Fairchild Hiller Corp. v. McDonnell Douglas Corp., 28 N.Y.2d 325, 321 N.Y.S.2d 857 (1971), for this proposition, that important decision says something quite different, to wit: an assignment violates Section 489 only if made "for the very purpose of bringing suit and this implies an exclusion of any other purpose." 28 N.Y.2d at 330.

We submit that the summary judgment appealed from cannot stand. That judgment is contrary to the law of New York. It is contrary to the rules applicable to motions for summary relief. It is unsupported by the facts adduced below, properly viewed. And it violates fundamental notions of fairness: Continental was deprived not only of the opportunity to try these issues, but also of the opportunity to develop a full record on the issue which the district court summarily resolved.

The Issues on Appeal

I. Is an assignment valid as a matter of law under Section 489 of the Judiciary Law of New York, where there is no champerty in the transaction, where the assignment was made for tax purposes, and where the assignee and the assignor both were parties to the transaction out of which the assigned claim arose?

We submit that the answer is "Yes".

II. Does an issue of genuine fact exist which precludes the granting of summary judgment, where the issue is that of intent, where the movant asserted that a substantial issue exists, and where the only evidence in the record supports appellant's contention that the purpose of the assignment was proper?

We submit that the answer is "Yes".

III. Should a summary judgment be reversed where that judgment was grounded upon an issue which was not set forth in the movant's Rule 9(g) Statement and which was not fully addressed by the parties, and where, for that reason, material evidence bearing on the issue was not brought before the court?

We submit that the answer is "Yes".

IV. Should a summary judgment be reversed where that judgment has been entered upon a finding that an assignment between a contracting party and its parent company was invalid and consequently that the parent could not assert rights in the contract, but where there is evidence that the contracting parties intended that no assignment be required before the parent be able to assert such rights?

We submit that the answer is "Yes".

Statement of the Facts

Background

This is a dispute between two large international grain trading companies which have been dealing with each other, in substantial quantities, since 1970 (55).* The dispute centers on four transactions:

1. On November 26, 1974, Moretti contracted to sell a quantity of wheat to Continental (19, 22-23). On January 9, 1975, Continental's wholly-owned Domestic International Sales Corporation ("DISC"), organized under Sections 991-97 of the Internal Revenue Code, contracted to sell other wheat to Moretti (19, 24-25). On January 15, 1976, Moretti and Continental agreed to a "wash-out" of these contracts, and Continental issued a credit to Moretti's account in the amount of $223,520 (19-20, 28).

2. On November 26, 1974, Moretti contracted to sell more wheat to Continental (20, 29-30). On January 19,

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* The numbers in parentheses refer, here and hereafter, to the pages of the Appendix.

1976, Moretti and Continental agreed to a "circle settlement" of this contract, and Continental issued a credit to Moretti's account in the amount of $225,866.96 (20, 31).

3. On November 15, 1974, Continental's DISC contracted to sell a quantity of soybean meal to Moretti (20, 37-39). On February 10, 1976, Moretti repudiated this contract (55-56). Shortly thereafter, Continental's DISC assigned its claim under this contract to Continental (56, 115-116). By virtue of a compulsory arbitration provision in the contract, the soybean claim subsequently was submitted to arbitration in London, England. On September 21, 1976, the arbitrators decided against Moretti and awarded $1,493,520.00 damages (63-64, 77, 80). Moretti has appealed from that arbitration award, and that appeal is pending.

4. On January 20, 1976, another of Continental's wholly-owned subsidiaries, Deutsche Conti Handelsgesellschaft ("Deutsche Conti") contracted to sell a quantity of corn to Moretti (20, 35-36).

In sum: Moretti is entitled to a $449,386.96 credit on the wheat contracts. However, by virtue of the award of the arbitrators, Moretti owes Continental's DISC $1,493,520.00 on the soybean contract, and the DISC has assigned that claim to Continental, its parent.

It is Continental's position that these transactions are part of a running account between Moretti and Continental (55-57). Where, as here, contracts between large international grain traders are "performed" other than by physical delivery of grain (as by "washout", "circle settlement", or arbitral award), they become part of a running account between the parties. Here, the $449,386.96 credit is more than balanced by the $1,493,520.00 debit represented by the soybean arbitration award.

The Proceedings Below

On February 18, 1976, one week after repudiating the soybean contract, Moretti filed the complaint herein (4-7).

Moretti alleged three counts. The first two concerned the wheat transactions. Moretti alleged that $449,386.96 was then due to Moretti by virtue of the two credits issued by Continental on those transactions. The third count involved the corn contract with Deutsche Conti. Moretti alleged that Deutsche Conti had failed to pay Moretti $390,000 due under that contract.

Significantly, Moretti named only Continental Grain Company as the party defendant. Although one of the wheat contracts was with Continental's DISC, and although the corn contract was with another of Continental's subsidiaries, Deutsche

Conti, Moretti sued only Continental. This pleading (as well as other documentary evidence set forth, infra) reflects Moretti's recognition that Moretti and Continental are the real parties in interest to all these contracts, notwithstanding the use of subsidiaries for tax, or other incidental purposes.

Continental answered the complaint and asserted, as a counterclaim and set-off, the claim under the soybean contract which the DISC had assigned to Continental (8-11).

After issue was joined, and without discovery by either party, Moretti moved for partial summary judgment on the first and second counts (14-17). In its moving papers, Moretti documented the wheat transactions in question and the fact that the soybean dispute was the subject of then-pending arbitration in London (18-41). In its memorandum of law, Moretti contended that summary judgment on the wheat contract claims was proper, under Rules 54(b) and 62(h) of the Federal Rules of Civil Procedure, "notwithstanding the existence of a contested, unliquidated counterclaim" (46-47). Moretti argued that there was no good reason to delay judgment on the wheat transaction pending resolution of the then-pending soybean arbitration (42-52).

Moretti's Rule 9(g) Statement, which framed the issues on the motion, did not mention the assignment (15-17). There also was not one word in Moretti's supporting affidavit

(18-41) concerning the assignment. And in its memorandum of law, Moretti did not take the position that summary judgment should be granted on the ground that the assignment was invalid. On the contrary, the memorandum asserted (46, 48, emphasis added):

> "Defendant asserts the counterclaim only by virtue of an alleged assignment, the existence of which is unverified, and which, if it exists, may well have been given without consideration and solely for purposes of this litigation. . . . [T]here is a substantial issue of whether defendant is a bona fide assignee for value of the counterclaim under the soybean contract or whether that assignment, if it exists, was improperly given solely to furnish defendant with some means of attempting to frustrate plaintiff's efforts to collect the sums concededly due under the wheat transactions."

In its answering papers, Continental's affidavit showed that the wheat and soybean transactions were part of a running account and, for this reason (and for other reasons not here relevant), Moretti's wheat claim and Continental's soybean claim should be treated and disposed of together (53-74).

In passing, Continental also spoke of the assignment of the soybean claim, and the relationship between Continental and the assignor. Continental's affidavit and exhibits established the following concerning the purpose of the assignment:

(a) to reduce its tax liability, Continental conducts all of its qualified export sales through its DISC, Continental Grain Export Corporation, pursuant to Sections

991-997 of the Internal Revenue Code (56, 58-60). In effect, the DISC operates as a conduit for sales such as between Continental and Moretti;*

(b) further to reduce its tax liability, in accordance with the Internal Revenue Code, the net income produced from these export sales transactions is deemed to be the profit of the DISC to the maximum extent allowable under the tax laws, and losses deemed to be Continental's (59);

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* Professors Bittker and Eustice describe the parent-DISC relationship as follows, Taxation of Corporations and Shareholders, 1976 Supplement, No. 2, at 17-15 (emphasis added):

> "In general a DISC is a domestic corporation whose income, for taxable years beginning after 1971, is derived primarily from export sale and lease transactions (and certain other export-related activities or investments) and whose properties consist predominantly of 'qualified' export-related assets. The principal function of a DISC is to handle the export sales and leasing activities of a domestic enterprise. Such a corporation is not subject to federal income tax if it elects to be treated as a DISC; instead, approximately one-half of the DISC's earnings are taxed currently to its shareholders as constructive dividends even though not distributed, and the rest of its earnings are not taxable to the shareholders until actually distributed, or until a shareholder disposes of his DISC stock in a taxable transaction or the corporation ceases to qualify as a DISC, at which time they are includible, at the shareholder level, as a dividend. In effect, taxation is deferred for approximately one-half the export earnings of a DISC, the other half being subject to current taxation, as constructive dividends, at the shareholder level. In many respects a DISC is treated like a foreign 'branch', or at least like a mere 'paper' foreign corporation whose function is to provide a convenient bookkeeping mechanism for isolating export profits of the enterprise."

(c) the soybean transaction was such an export sale, whereby the DISC acted as a conduit between Continental and Moretti (55-56);

(d) shortly after Moretti repudiated the soybean contract, the DISC assigned its claim under the contract to Continental (56);

(e) it was pursuant to the DISC-parent relationship and purpose that this assignment was made (56).

Moretti's reply memorandum of law asserted three arguments: (1) a restatement of Moretti's initial position that summary judgment should be entered on the wheat claim irrespective of Continental's soybean claim for set-off; (2) an argument that there was in fact no running account;* (3) the new assertion that summary judgment should be granted because the assignment was invalid under Section 489 of the Judiciary Law (102-114).

This new assertion was contained in four pages of legal argument in Moretti's brief; no factual material was

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* There is no doubt that a genuine issue of fact exists concerning this issue: contrast Continental's proofs (55-57) with the statements of Moretti's witness (75-77).

submitted in support thereof. The legal argument consisted principally of a cursory discussion of the case law under Section 489 of the Judiciary Law (104-08). As to why the assignment between the DISC and Continental was invalid, Moretti's brief made two points.

First, Moretti argued that "[d]efendant has not denied [the] assertion [in Moretti's main brief] . . . that the assignment had been given without consideration and solely for the purposes of this litigation." (106).

This argument mischaracterized the record. Far from saying anything which required a denial, Moretti's main brief had asserted that the assignment's validity posed "a substantial issue". And Moretti had not contended in its moving papers that summary judgment should be granted because the assignment was invalid. Moreover, Continental's answering papers had explained the purpose of the assignment, albeit in a somewhat laconic manner attributable to the fact that the issue was irrelevant at that time.

Second, Moretti "noted" (106) that the soybean arbitration was proceeding in the rame of the DISC, rather than in Continental's name.

In this posture, the motion was submitted. In mid-January, Judge Ward asked to see the assignment from the DISC

to Continental. On January 31, 1977, the court below issued its memorandum opinion (117-123).

The Memorandum Opinion

The opinion below does not address the argument upon which Moretti sought summary judgment (i.e., that summary judgment should be entered because there was no reason to withhold it).* Instead, it grounds the summary judgment solely on the assignment's supposed invalidity under Section 489 of the Judiciary Law.

Moreover, the opinion below fails to recognize that the issue of an assignment's validity under Section 489, which requires a finding as to motive and intent, presents a question of fact particularly inappropriate for summary judgment. Sprung v. Jaffe, 3 N.Y.2d 539, 544 (1957) (reversing such a summary judgment). ("[T]he question of the intent and purpose of the purchaser or assignee is generally one of fact to be decided by the trier of the facts . . ."); Empire Management Corporation v. Russo, 81 N.Y.S.2d 817 (N.Y. Co. 1948); Carpenter v. Cummings, 20 Misc. 661, 46 N.Y. Supp. 252 (City Ct. of N.Y. 1897).

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* Of course, if the assignment were valid and if the wheat and soybean contracts were part of a running account, there would be a compelling reason to withhold judgment on the wheat contract, to wit: the parties intended that the two claims be disposed of together.

Instead, the opinion moves immediately to what the court below held to be the test applicable under New York law.* The court stated that the assignment from the DISC to Continental (119, emphasis added),

> "is invalid if it is not part of a substantial commercial transaction and the primary purpose of it is to enable the assignee to commence suit thereon. See Fairchild Hiller Corp. v. McDonnell Douglas Corp., 28 N.Y.2d 325, 330, 321 N.Y.S.2d 857, 860-61 (1971)."

Fairchild Hiller does not stand for this proposition. In that most recent statement of the law, the New York Court of Appeals said nothing about the necessity of "a substantial commercial transaction", but did plainly say, 28 N.Y.2d at 330 (emphasis added):

> "We have consistently held that in order to fall within the statutory prohibition, the assignment must be made for the very purpose of bringing suit and this implies an exclusion of any other purpose."**

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* New York law governs the question of the assignment's validity because this is a diversity action.

** In Fairchild Hiller, the Court of Appeals upheld an assignment of a contract claim from Republic Aviation Corporation to Fairchild Hiller Corporation. Fairchild Hiller had obtained this claim as a part of its purchase of Republic's operating assets. In applying the long-established test set forth in the text and holding that the assignment was not made solely for purposes of litigation, the Court of Appeals merely noted that the acquisition of the claim was part of a larger commercial transaction; the Court of Appeals did not alter the old rule and engraft a new "substantial commercial transaction" requirement.

Turning to the facts, the court below identified three things which persuaded it that the assignment was invalid under its reading of Section 489:

1. The court below stated that Continental had not denied the assertion that the assignment was made for the purpose of litigation (120). From this unjustified characterization of the record, the court inferred that the assignment was in fact made for that purpose.

2. The assignment's first four paragraphs are a standard recital that the DISC intends to, and does, assign all its rights in the soybean contract to Continental. The assignment's final paragraph contains the following language (115-16, emphasis supplied):

> Assignor constitutes Assignee as Assignor's true and lawful attorney, irrevocably, with full power (in the name of Assignor or otherwise) . . . to file any claim or to take any action or institute any proceeding including arbitration which Assignor deems necessary in connection with the Contract and the enforcement of rights thereunder.

Focusing on this last language, the court below inferred that the DISC did not intend to surrender all its rights in the soybean contract (119).

This language was noticed, and this argument raised, sua sponte. Continental first encountered each when it read the

memorandum opinion below. As described, infra, this posture precluded Continental from addressing the seeming inconsistency.

3. As indicated, the soybean arbitration proceeded in the name of the DISC. From this fact, the court below inferred that the DISC retained certain rights to the soybean claim (120).

On the strength of these inferences, the court below found that the assignment violated Section 489 and, consequently, that Continental could assert no rights under the soybean contract. That being so, the court below dismissed Continental's counterclaim and set-off.* The claim for set-off gone, summary judgment was entered against Continental on Moretti's wheat claim (125). Finally, Moretti's third count, on the corn contract with Deutsche Conti, was dismissed with the consent of the parties (124).

POINT I

THE ASSIGNMENT WAS NOT INVALID UNDER SECTION 489

Section 489 of the Judiciary Law (like its predecessor provision, Section 275 of the Penal Law) provides that no cor-

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* In dismissing Continental's soybean claim, the court below acted sua sponte (121). Consistent with its position in the moving papers that the assignment's validity posed a substantial issue, Moretti had not sought dismissal of the soybean claim.

poration,

> "shall solicit, buy or take an assignment of . . . [a] thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon. . . ."

An assignment violative of this statute is unenforceable, and an entity or person who violates this law is guilty of a misdemeanor and is subject to a fine of up to $5,000.*

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* The full text of the statute is as follows:

> "No person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims, and no corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon; provided however, that bills receivable, notes receivable, bills of exchange, judgments or other things in action may be solicited, bought, or assignment thereof taken, from any executor, administrator, assignee for the benefit of creditors, trustee or receiver in bankruptcy, or any other person or persons in charge of the administration, settlement or compromise of any estate, through court actions, proceedings or otherwise. Nothing herein contained shall affect any assignment heretofore or hereafter taken by any moneyed corporation authorized to do business in the state of New York or its nominee pursuant to a subrogation agreement or a salvage operation, or by any corporation organized for religious, benevolent or charitable purposes.
>
> Any corporation or association violating the provisions of this section shall be liable to a fine of not more than five thousand dollars; any person or co-partnership, violating the provisions of this section, and any officer, trustee, director, agent or employee of any person, co-partnership, corporation or association violating this section who, directly or indirectly, engages or assists in such violation, is guilty of a misdemeanor."

As noted, supra, the court below misinterpreted the test of an assignment's validity under the statute. The district court held that an assignment is invalid if it is not part of a substantial commercial transaction and its primary purpose is litigation. However, the rule under New York law is that an assignment runs afoul of the statute only if its sole purpose is litigation. The district court's erroneous holding conflicts with the narrow and specific purpose of the statute and the well-established limits on the statute's applicability.

The limited purpose of Section 489 is "the prevention of champertous agreements and the unauthorized practice of law by corporations." Fairchild Hiller v. McDonnell Douglas Corp., 28 N.Y.2d 325, 329 (1971). The courts have unanimously so held. Moran Towing & Transportation Co. v. Conners-Standard Marine Corp., 226 F. Supp. 1013, 1017-18 (S.D.N.Y. 1963); American Hemisphere Marine Agencies, Inc. v. Kreis, 40 M.2d 1090, 244 N.Y.S.2d 602 (N.Y. Co. 1963); Famous Artists Schools, Inc. v. Cook, 121 N.Y.S.2d 457, 460 (Municipal Ct. of N.Y.C. 1953); Pan-American Securities Corp. v. Fried, Krupp Aktiengesellschaft, 169 Misc. 445, 6 N.Y.S.2d 993, 998 (Kings Co. 1938), aff'd, 256 App. Div. 955, 10 N.Y.S.2d 205 (2d Dept. 1939).

It is only when an assignment is made "for the very

purpose of bringing suit" that it is invalid, "and this implies an exclusion of any other purpose (Moses v. McDivitt, 88 N.Y. 62, 65)." Fairchild Hiller, supra, at 330. Thus, the mere fact that an assignee may intend to litigate the assigned claim does not violate Section 489. For example, in Moses v. McDivitt, 88 N.Y. 62 (1882) -- the vitality of which the New York Court of Appeals recently reaffirmed in Fairchild Hiller -- an assignment was upheld where one of its purposes was to acquire certain assets even though another purpose was to bring suit. Construing Section 489's predecessor provision, the Court of Appeals wrote:

> "[O]ne is not prohibited from . . . purchasing . . . choses in action, either for investment or for profit, or for the protection of other interests, and such purchase is not made illegal by the existence of the intent on his [i.e., the assignee's] part at the time of the purchase, which must always exist in the case of such purchases, to bring suit upon them if necessary for their collection."

The few decisions which have invalidated assignments as violative of Section 489 reflect its narrow purpose.

For example, in Hospital Credit Exchange, Inc. v. Shapiro, 186 Misc. 658, 59 N.Y.S.2d 812 (Municipal Ct. of N.Y.C. 1946), defendant had been a patient at a hospital and had not paid for services rendered. The hospital assigned its

claim against the patient to the Hospital Credit Exchange, Inc., as part of a regular course of business whereby that corporation served as a collection agency, soliciting and taking assignments of claims for the purpose of bringing suit and retaining for itself a percentage of the award. The court held that this assignment was invalid under the statute. American Restaurant China Manufacturers Association, Inc. v. Corning Glass Works, 24 M.2d 634, 198 N.Y.S.2d 366 (Erie Co. 1960), involving assignments of claims by manufacturers of china to the manufacturers association, is to like effect. And in Bennett v. Supreme Enforcement Corp., 250 App. Div. 265 (1st Dept.), aff'd, 275 N.Y. 502 (1937), the sole function of the assignee was to take over and litigate the uncollected claims of its parent corporation, i.e., to conduct litigation for another.

This case law simply has no relation to the transaction here at issue. No one suggests that Continental served as the "collection agency" for its DISC's claims. There is not a hint of champerty in the assignment from the DISC to Continental, or in any other aspect of this transaction.

Furthermore, the context of the assignment -- specifically, the relationship of both the assignee and the assignor to the transaction which gave rise to the claim which was assigned -- makes it clear, beyond doubt and as a matter of law, that the assignment does not violate Section 489.

In Famous Artists Schools, Inc. v. Cook, 121 N.Y.S.2d 457 (Municipal Ct. of N.Y.C. 1953), a bank had loaned money to defendant to finance defendant's studies at plaintiff school. Defendant defaulted in his payments, and (pursuant to a prior agreement) the school reimbursed the bank for the balance due. The bank then assigned to the school its claim against defendant. Rejecting defendant's contention that this assignment violated Section 489, the court restated an important limitation upon the reach of the statute, 121 N.Y.S.2d at 460 (emphasis added):

> In every case cited by the defendant the plaintiffs in those actions had no conection with the transaction which gave rise to the claim in suit and acquired such claim by assignment, solely for the purpose of bringing an action thereon. Those circumstances, which are common to all the cases cited by the defendant, clearly distinguish them from the instant matter.

Accord, American Hemisphere Marine Agencies, Inc. v. Kreis, 40 M.2d 1090, 244 N.Y.S.2d 602 (N.Y. Co. 1963). ("[I]t is uncontradicted that plaintiff and its assignor are interrelated corporations, and it is clear that plaintiff itself was involved in the transactions alleged from the very beginning. In such circumstance, the assignment was not in the purview of [the statute]"); Moran Towing & Transportation Co. v. Conners-Standard Marine Corp., 226 F. Supp. 1013, 1018 (S.D.N.Y. 1964) ("[Plaintiff-assignee] was directly concerned in the transaction

which gave rise to the suit. In the light of the interpretation given to the statute by the New York cases, there is nothing which would bring the [assignment] within the proscription of the statute.")

So, too, here. Continental was directly involved in the transaction between its DISC and Moretti from the very inception. The DISC, indeed, was a mere conduit which, solely for tax purposes, was interposed between Continental and Moretti. The DISC was not manufactured for the purposes of this, or any other, litigation. The DISC was established, as permitted by the Internal Revenue Code, "to provide a convenient bookkeeping mechanism for isolating export profits." Bittker and Eustice, Taxation of Corporations and Shareholders, 1976 Supplement, No. 2 at 17-15. And it was for that same purpose -- to minimize a tax obligation by shifting away from the DISC a possible loss on a defaulted contract -- that the DISC assigned its claim under the soybean contract to Continental (56, 58-60). These facts were sworn to below, and no contrary evidence was submitted.

In sum, the New York case law recognizes, as a matter of law, that the assignment at issue does not violate either the civil or the penal provisions of Section 489 of the Judiciary Law. Consequently, the holding of the district court was erroneous and should be reversed. And the various factual matters

which the court below found to be of interest -- including the language of the assignment and the name in which the London arbitration was brought -- are simply irrelevant to this question.

POINT II

A GENUINE ISSUE OF FACT EXISTS CONCERNING THE PURPOSE OF THE ASSIGNMENT

Moreover, there surely is a genuine issue of fact concerning the factual matters upon which the court below relied in granting summary judgment.

A party seeking summary judgment bears a heavy burden. United States v. Bosurgi, 530 F.2d 1105 (2d Cir. 1976); Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317 (2d Cir. 1975); Judge v. City of Buffalo, 524 F.2d 1321 (2d Cir. 1975).

That burden is heavier still when the issue on summary judgment is whether an assignment is invalid under Section 489 of the Judiciary Law. For, under Section 489, "the question of the intent and purpose of the . . . assignee is generally one of fact to be decided by the trier of fact." Sprung v. Jaffe, 3 N.Y.2d 539, 544 (1957).

Far from supporting this great weight, the record below indicates that the assignment here at issue is perfectly valid. Prima facie, the assignment is valid. The instrument

of assignment recites that it was made for consideration (115). An affidavit sworn to by Continental's Assistant Vice President, together with accompanying exhibits, indicates that the assignment was made for tax purposes pursuant to the relationship between parent and subsidiary contemplated by the Internal Revenue Code (56, 58-60). Finally, it is of some significance that Moretti asserted in its moving brief below that the validity of the assignment presented "a substantial issue" (48).

Notwithstanding this evidence that the assignment was valid, the court below relied on three inferences in finding that there was no genuine issue but that the assignment was invalid. Each of those inferences was impermissible:

1. Continental's "silence".

The court below mischaracterized the record when it stated (120) that Continental remained silent in the face of Moretti's assertion that the assignment was without consideration and was made for the purpose of litigation. The assignment itself recites that it was given for good and valuable consideration (115). And even though there was no reason for Continental to address the issue of the assignment's validity in its answering papers, Continental did show that the assignment was made for a valid tax purpose. The district

court simply rejected this uncontradicted, unimpeached, sworn testimony.

True, Continental did not utter the magic words, "There is a question of fact as to the validity of the assignment," or "The assignment was made for a valid purpose." But no such words were necessary: the tax purpose of the assignment was described, there was no evidence to the contrary, and nothing further remained to be said. Moreover, the omission of such magic words is perfectly understandable: not only did Moretti not contend at that point that the assignment was invalid, Moretti expressly stated in its moving papers that a substantial issue existed on this question.

It was improper for the court below to draw an inference against Continental on this ground, and especially so in light of the standards applicable to a motion for summary judgment. Heyman v. Commerce and Industry Insurance Co., 524 F. 2d 1317 (2d Cir. 1975).

2. The assignment's final paragraph.

The assignment consists of five paragraphs. In three whereas clauses, the DISC and Continental unequivocally state their intention to assign all right, title and interest under the soybean contract from the DISC to Continental. The

first decretal paragraph is a standard, and also unequivocal, recital of the assignment of that contract to Continental (115).

The second and final decretal paragraph is inconsistent with all that comes before it. It states that the assignee [i.e., Continental] has "full power . . . to file any claim or to take any action . . . which Assignor [i.e., the DISC] deems necessary. . . ." (115-16).

It was impermissible for the court below to draw from this last paragraph the inference that the DISC did not intend to accomplish a true assignment. At best for Moretti, the last paragraph conflicts with all that comes before it, makes the document ambiguous, and raises a question of fact concerning its meaning. That question may not be resolved against Continental on a motion for summary judgment, Heyman, supra -- and especially so considering that the ambiguity was first noticed sua sponte in the opinion below, and Continental had no opportunity, even by way of affidavits, to address the inconsistency which bothered the district court.

Furthermore, the inference drawn by the court below is highly unlikely. As interpreted below, the assignment makes no sense. On the other hand, the inconsistency between the first four paragraphs and the last can be explained reasonably and simply as a typographical error: substitute the word

"Assignee" for "Assignor" and there is no inconsistency. This inference is at least as plausible as the contrary inference which the district court embraced.

3. The arbitration in the DISC's name.

The record is silent concerning why the soybean arbitration proceeded in the DISC's name. Only speculation supports the inference, drawn by the court below, that so styling the arbitration was an intentional choice which evidences an intent by the DISC not to surrender all rights in the contract.

More likely, Continental gave no thought to the nomenclature of the arbitration proceeding, and that proceeding was brought in the DISC's name simply because the DISC was the entity whose name was on the soybean contract (37).

It is not, of course, an infrequent occurrence for an assignee to bring a claim in the name of an assignor. This happens all the time, for example, when an insurance company by subrogation brings a claim for injury to its insured; there is no doubt that the insurance company owns the claim even though it sues in the name of the person injured. Likewise, when a corporation acquires the assets of another corporation, including its accounts receivable, there is no doubt that the successor corporation owns these receivables even though it sues for collection in the name of the predecessor corporation.

The assignment at bar expressly permitted Continental to do just that, i.e., to bring suit "in the name of the Assignor" (115).*

Certainly, it was improper for the court below to choose the inference which not only was least favorable to Continental but also least plausible on this record.

We submit that the only fair reading of the record below is that the DISC assigned its soybean claim to Continental and that it did so for valid tax purposes, to shift any loss on the soybean transaction to the pa[illegible] in accordance with the general policy of minimizing the DISC's losses on export sales transactions. On the other hand, no reasonable reading of the record supports the conclusion that the sole purpose of the assignment was to bring suit, or that this was a champertous transaction. Consequently, the assignment is not invalid under Section 489. Cf., Moses v. McDivitt, 88 N.Y. 62 (1882) (assignment held valid where its purpose was to acquire other assets).

But it is not Continental's burden, on the motion below or on this appeal, to prove the purpose of the assignment. It was Moretti's heavy burden, taking the facts and the reasonable inferences in the light most favorable to Continental, to establish that no genuine issue of fact exists concerning the

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* Interestingly, when the court below quoted in its memorandum opinion from the last paragraph of the assignment, it ellipsed from the quoted language the phrase which empowered Continental to bring an action in the DISC's name. Compare the record at 119 to the record at 115.

purpose for which the assignment was made. The meager record below is insufficient so to establish.

POINT III

THE DECISION BELOW WAS BASED UPON A GROUND WHICH WAS NOT SET FORTH IN MORETTI'S RULE 9(g) STATEMENT, AND WAS MADE WITHOUT AFFORDING CONTINENTAL A MEANINGFUL OPPORTUNITY TO BE HEARD ON THE ISSUE WHICH THE DISTRICT COURT FOUND TO BE DISPOSITIVE; AT THE VERY LEAST, THE DECISION SHOULD BE VACATED AND REMANDED FOR FURTHER CONSIDERATION

Moretti's Rule 9(g) Statement, which framed the issues on the motion for summary judgment, was silent concerning the assignment from the DISC to Continental. Nevertheless, the district court granted summary judgment on a finding of fact that the assignment was made for an improper purpose.

Because Moretti sought summary judgment on issues other than the assignment's validity, the record was not fully developed on the issue which the court below found to be determinative. Nothing was said, for example, about the assignment's mysterious last paragraph until the district court focused on that language in its memorandum opinion; accordingly, Continental did not have an opportunity to address this question. Given the posture in which the issue of the assignment's validity was raised, certain material matters were not brought before the court and are not part of the record.

Had the matter been permitted to go to trial, Continental would have submitted documentary proofs which indicate that Moretti intended to deal and to settle with Continental, irrespective of Continental's use, for tax or other purposes, of subsidiaries as conduits for certain transactions.* This evidence undercuts the district court's inference that the nomenclature of the arbitration proceeding is significant. Yet this material was not before the court below and is not part of the record.

Continental has a right to have Moretti's motion for

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* For example, Moretti stated in a telex to Continental dated March 5, 1976:

> "We wish it to be clear . . . that on the part of our client the dispute is considered as one single dispute . . .";

Then, in a telex dated March 8, 1976, Moretti reiterated its understanding:

> "This is to confirm you once more that we cannot accept to discuss present dispute separately with your company on one side and Contigrain [i.e., Continental] and Conti-export [i.e. the DISC] on the other side because all problems and relations between us and your group are strictly connected."

And in an affidavit submitted in support of an application in the London arbitration proceeding, Moretti's counsel asserted that Moretti repudiated its soybean contract with the DISC because of alleged wrongdoing, not by the DISC, but by still another of Continental's European subsidiaries.

summary judgment in this substantial contract action decided upon a full record and according to proper standards of law and procedure. Accordingly, at the very least, the summary judgment should be vacated, and the matter further considered in the district court. Cf., Rhoads v. McFerran, 517 F.2d 66, 68 (2d Cir. 1975) (reversing a summary judgment and remanding to the district court "to afford the parties the opportunity to present relevant evidence with respect to material factual issues," where the district court, inter alia, resolved certain factual issues which were not mentioned in the Rule 9(g) Statements).

POINT IV

MORETTI AND CONTINENTAL INTENDED TO SETTLE DISPUTES BETWEEN THEM WITHOUT REGARD TO CORPORATE SUB-ENTITIES; ACCORDINGLY, CONTINENTAL MAY ASSERT RIGHTS IN THE SOYBEAN CONTRACT WITHOUT REFERENCE TO THE ASSIGNMENT

Let us assume, arguendo, that no genuine issue of fact exists and that the assignment of the soybean contract from the DISC to Continental is invalid. It does not follow, as the court below believed it did, that Continental may not in that event assert a claim under the soybean contract. For while that result would follow in the normal case, here the record indicates that the parties intended to settle disputes on such transactions without regard to the existence of subsidiaries.

In short, Moretti intended to deal, and to settle, with Continental, irrespective of Continental's use, for tax or any other purposes, of a subsidiary as a conduit for grain transactions. Thus:

-- One of the three contracts upon which Moretti's wheat claims in this action are based is a contract between Moretti and Continental's DISC (24-25). Yet Moretti sued Continental on all these contracts and did not join the DISC as a party defendant.

-- The contract upon which Moretti's third count in this action is based is a contract between Moretti and another of Continental's subsidiaries, Deutsche Conti (32-34). Yet Moretti sued Continental on this count and did not join Deutsche Conti as a party defendant.

-- In papers referred to, supra, page 33, footnote, Moretti states that "all problems and relations between [Moretti] and your group [i.e., Continental and its subsidiaries] are strictly connected," and otherwise acknowledges that, in dealing with a subsidiary of Continental, Moretti in fact was dealing with Continental.

-- Continental's DISC is a mere bookkeeping mechanism. It has no inventory or staff of its own (59); shipments of

grain are made directly from Continental to the customer (59); the DISC merely keeps a separate set of books, in accordance with the Internal Revenue Code (60). Obviously, Moretti could not have thought it was dealing with the DISC.

There is a substantial basis for concluding that Moretti intended that Continental be the real party in interest to the soybean contract, just as Continental acknowledged that it was the real party in interest to the wheat contract executed in its DISC's name. Under these circumstances, Continental could assert rights under the soybean contract even if the assignment from its DISC were invalid.

In the rush to summary judgment below, this issue, too, was not addressed, either by the parties or by the court. That judgment should be reversed, so that these important matters may be developed.

CONCLUSION

For the foregoing reasons, the summary judgment against Continental should be reversed.

New York, New York
June 3, 1977.

Respectfully submitted,
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Appellant
345 Park Avenue
New York, New York 10022

Of Counsel:
Mark H. Alcott
Marvin Wexler

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